

ABD MANAP MAAMIN*a***v.****PP**

HIGH COURT MALAYA, MELAKA

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LOW HOP BING J

[CRIMINAL APPLICATION NO: MT2-44-3-2002]

19 AUGUST 2003

CRIMINAL PROCEDURE: *Revision - Revision against decision of magistrate - Plea of guilty - Whether application devoid of merits - Penal Code ss. 295, 419 - Criminal Procedure Code ss. 311, 316, 317, 323, 325 - Courts of Judicature Act 1964, s. 31 - Federal Constitution*

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The accused had filed an application for a revision of the decision of the learned magistrate on the ground that the decision had contravened the Federal Constitution and Chapter XIV of the Criminal Procedure Code. The accused was convicted for an offence of cheating under s. 419 of the Penal Code and was sentenced to 60 months' imprisonment and one year of police supervision. Before the learned judge, the accused argued that the decision ought to be revised upon as he was not present at the hearing, was unrepresented by counsel and had pleaded guilty in ignorance of the nature and consequences of his plea.

*d**e***Held (dismissing the application):**

[1] The accused had the opportunity of being heard personally before the learned magistrate. He told the court that he understood the charge, to which he pleaded guilty and that he understood the nature and consequences of his plea. He was also given the opportunity of raising his plea in mitigation. (p 6 c-e)

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[2] The maximum punishment provided for the offence of cheating under s. 419 of the Penal Code is seven years' imprisonment, with whipping and a fine. The sentence of 60 months imprisonment imposed by the learned magistrate was within the statutory maximum of seven years. (p 6 g)

*g***Case(s) referred to:**

Liaw Kwai Wah & Anor v. Public Prosecutor [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 (*refd*)

*h**i*

a Legislation referred to:

Courts of Judicature Act 1964, s. 31
Criminal Procedure Code, ss. 311, 316, 317, 323, 325(ii)
Penal Code, ss. 419, 420

For the accused - GR Shankar; M/s R Shankar Ghandhi & Assocs

b *For the prosecution - Abdul Rashid Daud; DPP*

Reported by Mariette Peters-Goh

JUDGMENT

c Low Hop Bing J:

This is an application filed on 5 November 2002 by the applicant/accused ("the accused") by way of notice of motion for revision of the decision given on 14 April 1998 by the learned magistrate in Melaka arrest case No. 83-484-87 on the ground that the said decision has contravened the Federal Constitution and Chapter XIV of the Criminal Procedure Code.

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Factual Background

This has been set out by the accused in his affidavit in support.

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The accused was on 16 April 1998 convicted and sentenced to 60 months imprisonment to be followed by one year's police supervision, for the offence of cheating by personation under s. 419 of the Penal Code. The said sentence was to commence from the expiry of the sentence meted out for the accused prior to the aforesaid conviction.

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On 29 September 1997, when the said case was called up for mention, the accused who was represented by counsel claimed trial and hearing was fixed for 1 April 1998.

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The accused was not present in the magistrate's court Melaka on 1 April 1998 as he was serving an imprisonment term in Alor Star prison. That being the case, his counsel who has received no instructions from him had discharged himself on the same date. The case was refixed for hearing on 16 April 1998.

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On 16 April 1998, the accused was brought to the magistrate's court Melaka and was unrepresented by counsel. He alleged that he was not given the opportunity to retain a counsel to defend him, and that he pleaded guilty without knowing anything on 16 April 1998. He further alleged that nobody in the court explained to him regarding the nature and consequences of his plea.

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He added that he is now 59 years of age and suffering from, *inter alia*, heart disease, diabetes and hypertension.

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The accused did appeal against sentence on 21 April 1998. As the then learned counsel has discharged himself, the said appeal was not proceeded with and has been struck out.

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Submission By Counsel And Decision By Court

GR Shankar, learned counsel for the accused, relied on s. 31 of the Courts of Judicature Act 1964 and submitted that although there was a delay of four and a half years in this application, the court has the discretion to order a revision. He added that the delay is reasonable in the circumstances and that there are merits in this application.

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Abdul Rashid Daud, learned deputy public prosecutor, contended that the court must examine the facts to determine whether or not to exercise the discretion and that the court should not open the floodgates. He urged that this application be dismissed as there are no merits.

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In my judgment it is to be observed that the established judicial principles governing the exercise of the High Court's power of revision have been succinctly stated in the weighty and authoritative judgment of Abdul Hamid CJ (Malaya) (later CJ) delivered for the Supreme Court in *Liaw Kwai Wah & Anor v. Public Prosecutor* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163. For the benefit of the legal profession, especially advocates and solicitors embarking upon an active practice in criminal law, the relevant portion of his Lordship's judgment merits reproduction in extenso as follows:

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Power of revision

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Section 31 of the Courts of Judicature Act, 1934 confers on the High Court, in respect of criminal proceedings and matters in the subordinate courts, the powers of revision. And s. 323 (i), Criminal Procedure Code (the Code), empowers a Judge to call for and examine the record of any proceeding before any inferior criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence, or order recorded or passed. Section 325 of the Code further provides that in any case, the record of proceedings of which had been called for by the Judge himself or which otherwise comes to his knowledge, the Judge may, in his discretion, exercise any of the powers conferred by ss. 311, 315, 316 and 317 of the Code. Among title powers set out in s 325(i), Criminal Procedure Code, is the power of the court to enhance or alter title nature of the sentence imposed (see also s. 316(b) of the Code).

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a Object of revision

We would observe that the power of revision is to be exercised in accordance with the law for the time being in force relating to criminal procedure. In the present case that law is the Criminal Procedure Code. We would also observe that the object of title revisionary powers provided for in the Code

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... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals. (*Emperor v. Nasrullah & Ors*) AIR 1928 287

d It is also clear that the High Court may examine the record of proceedings in the subordinate courts “wherever it considers that in doing so the purpose of justice will be served, as for example, when the record discloses no offence or when the accused is subjected to a vexatious and groundless prosecution.” (*Ramanathan Chettiyar v. Subrahmanya Ayyar* ILR 47 Mad 722).

Duty of High Court

e Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.

f The Judge’s duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the Judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

g Power is discretionary

The High Court’s power sitting in revision is discretionary. As it is, it must therefore be exercised judicially and within the limits and in the spirit of the legislation. “Discretion” is defined in *Words and Phrases Legally Defined*, vol 2, 2nd Ed, at page 82 to read:

h ‘Discretion’ means that it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke’s Case* (1598) 5 Co Rep 996); according to law and not humour. It is to be, not arbitrary, vague, but legal and regular. And

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it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v. Rastall* (1792), 4 Term Rep at p 757." (*Sharp v. Wakefield* (1891) AC 173, HL per Lord Halsbury, LC at p 179.)

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Maxwell on the Interpretation of Statutes, 12th. Ed, at pp 147-8, under the Heading "The exercise of discretion must be reasonable," states that:

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Even though an act done is ostensibly in execution of a statutory power and within its letter, it will nevertheless be held not to come within the power if done otherwise than honestly and within the spirit of the enactment. A discretion is to be "regulated according to known rules of law, (*Lee v. Bade & Torrington Junction Ry Co* (1871) LR 6 CP 576, per Willes J at pp 580, 581), and not the mere whim or caprice of the person to whom it is entrusted on title assumption that he is discreet ... 'It is true,' said Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223, P 229), 'the discretion must be exercised reasonably.

c**d**

The principles which should guide the courts in the exercise of the revisionary powers have been clearly set out by Jenkins CJ in *Emperor v. Lachiram* ILR 28 Bom 533. In that case his Lordship said that "this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly.

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Re Soo Leot [1956] MLJ 54, Buhagiar J following the principles laid down by Jenkins CJ in *Emperor* held that "the powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case.

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In *Liaw Kwai Wah, supra*, two accused were sentenced to, *inter alia*, one stroke of the rattan each, which whipping had been duly carried out. Subsequently, the learned judge of the High Court acting in revision enhanced the sentence, *inter alia*, of whipping to five strokes each. The issue before the Supreme Court was whether the learned judge had exercised the power of revision within the limits and in the spirit of the provisions of the Code which relate to the sentence of whipping. The Supreme Court held that the Code prohibited whipping to be executed in instalments and that it was clearly improper for a judge to exercise his discretionary power to impose additional strokes.

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Although the Supreme Court also referred to s. 325(ii) of the Code in relation to the other issue as to whether the High Court ought to give ample time to the accused to engage a counsel to prepare for his case in the event that the

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- a* case is called up for revision by the judge, the Supreme Court made it clear that their Lordships did not propose to answer it.

Be that as it may, I shall reproduce s. 325(ii) as follows:

- b* No order under this section shall be made to the prejudice of the accused unless he has an opportunity being heard, either personally or by an advocate, in his own defence.

- c* In this application, a consideration of the merits necessitates an examination and evaluation of the learned magistrate's record of proceedings. Having done so, I find that the record did clearly demonstrate that the accused has had an opportunity of being heard personally before the learned magistrate, on 16 April 1998, as he appeared and was given the opportunity of being heard personally.

- d* Indeed, when the charge was read over and explained to him in the magistrate's court, he told the court that he understood the charge, to which he pleaded guilty and that he understood the nature and consequences of his plea. All these details have been meticulously recorded by the learned magistrate in his notes of proceedings, which also revealed that the facts of the case were subsequently read and explained to the accused who admitted those facts without reservation, qualification and ambiguity, whereupon his plea was accepted and a conviction was recorded against him.

- e* The accused was given the opportunity of raising his plea in mitigation and he did mitigate by praying that the sentence be allowed to run concurrently with the imprisonment term he was then serving. He also admitted all his nine previous convictions after they were read over to him. It was long after all these procedural requirements and safeguards have been fulfilled by the learned magistrate that he meted out the above sentence in respect of the accused.

- f* The maximum punishment provided for the offence of cheating by personation under s. 419 of the Penal Code is seven years imprisonment, with whipping and a fine. The sentence of 60 months (five years) imprisonment imposed by the learned magistrate is within the statutory maximum of seven years.

- g* The sentence of police supervision is provided for in s. 295 of the Code and the power of a magistrate's court to impose this sentence is contained in the following relevant words of s. 295(i)(b).

- h* (i) when a person having previously been convicted of an offence punishable with imprisonment for a term of two years or upwards is convicted of any other offence also punishable with imprisonment for a term of two years or upwards:

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(a) [this concerns the corresponding power of the High Court or a Sessions Court];

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(b) a Court of a Magistrate may direct that he be subject to the supervision of the police for a period of not more than one year commencing immediately after the expiration of the sentence passed on him for the last of such offences.

b

Since the offence under s. 419 of the Penal Code is punishable with a maximum of seven years imprisonment, and the accused has been previously convicted of nine offences from 1978 to 1994 including not less than five occasions for the offence of cheating under s. 420 of the Penal Code, punishable with a maximum imprisonment for ten years, whipping and a discretionary fine, it is in my view proper for the learned magistrate to order a term of five years' imprisonment term to be followed by one year's police supervision.

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In the circumstances, the sentence meted out by the learned magistrate is correct, legal and proper and no miscarriage of justice has been occasioned thereby.

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Having dealt with the substantial merits of this application, I do not feel the necessity to deal with the issue of delay.

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In the circumstances, I am of the view that this application is devoid of merits and is hereby dismissed.

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